STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 24, 2005
v	No. 255018 Macomb Circuit Court
RAYMOND JOSEPH BABEL, Defendant-Appellant.	LC No. 2003-001039-FH

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), and sentenced to a prison term of forty-eight months to twenty years. He appeals as of right. We affirm.

I. FACTS

Defendant's conviction arises from allegations that he and David Destremps unlawfully entered his neighbor's house in Roseville. According to the complainant, days before the home invasion, he was backing his motorcycle out of his driveway when defendant's van nearly struck him. The complainant and defendant had a brief verbal altercation, and the complainant continued driving to a nearby gas station. The complainant testified that defendant followed him to the gas station, where the two men again exchanged hostile words. According to the complainant, on March 25, 2003, at about 2:00 a.m., Destremps knocked on his front door and told him that someone was tampering with his motorcycle in the garage. The complainant closed the front door, and went out a rear door into his garage, where defendant and Destremps confronted him. The complainant ran back into his house through a sliding glass door. The complainant, his wife, and Destremps testified that, as the complainant attempted to hold the door shut, the two men pulled and pounded on the door, while threatening to harm the complainant. After the complainant released the door and ran, defendant and Destremps entered the house. The complainant ran out the front door. The complainant's wife testified that, after advising defendant and Destremps that the complainant was no longer in the house, they left and fled to defendant's house.

Destremps testified at defendant's trial, and admitted that he and defendant went to the complainant's house to scare him and "pick a fight." Destremps indicated that, before the incident, he, defendant, and defendant's sister had consumed alcohol for several hours while

defendant repeatedly claimed that the complainant had attacked him after a traffic incident. Eventually, he and defendant went to the complainant's house, taunted him, and followed him into his house. After the complainant's wife told them to leave, they returned to defendant's house. Destremps later determined that defendant lied about being attacked by the complainant.

Defendant testified in his own behalf, and denied that he accompanied Destremps to the complainant's house.

II. ADJOURNMENT TO RETAIN NEW COUNSEL

Defendant first argues that the trial court abused its discretion by denying his motion for an adjournment in order to retain counsel of his choice. We disagree.

A. Standard of Review

A trial court's denial of a motion for adjournment to retain new counsel is reviewed for an abuse of discretion. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). "An abuse of discretion occurs when the result is so contrary to fact and logic that it demonstrates a perversity of will, defiance of judgment, or an exercise of passion or bias." *Id*. at 557 (citation omitted).

B. Analysis

On February 18, 2004, the first day of trial, defendant requested an adjournment to retain his former retained counsel, Jarrod Fleming, who initially represented him in this case. In November 2003, Fleming filed a motion to withdraw as retained counsel, alleging, inter alia, a breakdown in the attorney/client relationship, and defendant's failure to "cooperate with [counsel]," heed counsel's "recommendations or advice," and "act in accordance with the sound legal instruction." The trial court granted Fleming's motion to withdraw, and appointed Mark Awada as counsel for defendant. In requesting an adjournment, defendant alleged that his problem with Fleming was financial and he could now pay. Defendant did not indicate that his current counsel, Awada, was deficient in any way. Awada advised the trial court that defendant offered him money if he could get an adjournment for any reason, and asked him to "make something up." Awada further indicated that he was "fully prepared to try [the] case." In denying the request to adjourn, the trial court noted that Fleming had been discharged, that the motion was untimely, and that Awada was ready to proceed.

The Sixth Amendment guarantees a defendant the right to retain counsel of his choice, but that right is not absolute. *Id.* In determining whether a defendant's right to choose his own attorney has been violated, this Court must balance that right against the public's interest in the prompt and efficient administration of justice. *Id*. This Court should consider (1) whether the defendant is asserting a constitutional right, (2) whether the defendant had a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting the right, (4) whether the defendant was merely attempting to delay the trial, and (5) whether the defendant was prejudiced by the trial court's decision. *Id*.

Although defendant was asserting the constitutional right to be represented by counsel of his choice, he did not appear to have a legitimate reason for wanting to replace his appointed

attorney. Waiting until the day of trial to request new counsel is suspect in this case. Further, defendant's request that defense counsel obtain an adjournment by any means and the fact that the attorney he sought to retain had withdrawn three months earlier, supports a finding that the request for an adjournment was a delay tactic. Additionally, defendant has not demonstrated any resulting prejudice. Awada was familiar with the case, which was relatively straightforward, and effectively represented defendant. Consequently, the trial court did not abuse its discretion in denying defendant's request for an adjournment to retain different counsel.

III. ADJOURNMENT TO PRESENT AN ALIBI WITNESS

We also reject defendant's claim that the trial court abused its discretion by denying his request for an adjournment in order to call his sister, Lynn Zielinski, who was not present in the courtroom.[1] Defendant failed to move the court for a continuance, and it is established that a trial court has no duty to grant a continuance on its own motion. See *People v Elston*, 462 Mich 751, 764; 614 NW2d 595 (2000) ("the trial court cannot be faulted for failing to grant a continuance on its own motion"), and *People v Kelly*, 186 Mich App 524, 527; 465 NW2d 569 (1990) ("[a] trial court has no duty to grant a continuance on its own motion, and, thus, absent a motion for a continuance at trial, we will not review the issue on appeal"). Consequently, this claim does not warrant reversal.[2]

IV. PROPENSITY EVIDENCE

Next, defendant next argues that the prosecutor's questioning of a police witness denied him a fair trial because the elicited testimony implied that defendant was guilty because he had prior contact with the police. We disagree.

A. Standard of Review

Defendant failed to timely object to the testimony at trial; thus, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

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[1] Defendant claims that Zielinski would have corroborated his trial testimony that, at the time of the incident, he was inside his home.

[2] We note that, through his partial and selective recitation of the record, defendant has mischaracterized the proceedings. Contrary to what defendant claims, he did not request an adjournment so that his sister could testify. Rather, after the prosecution rested its case, outside the presence of the jury, defense counsel moved to strike the alibi witness. In doing so, defense counsel noted that, although defendant wanted him to call the witness, he decided as a matter of trial strategy that she did not "have anything good to offer," and her testimony would be "quite damaging" to defendant. The court responded that defense counsel and defendant needed to resolve the issue, and asked if defense counsel was ready to call the witness if necessary. Defense counsel stated that the witness was not available. The court then stated the following, which is the excerpt quoted by defendant: "We're going on. The witness has to be available." (Tr II, pp 72-73.)

B. Analysis

During the prosecutor's direct examination of the officer, he testified that Destremps was arrested and brought to the complainant's house for identification purposes. The following exchange then occurred:

> *Q.* Why was it that you didn't bring [defendant] back to [the complainant's] home?
>
> *A.* Myself, in speaking with [defendant] and observing his medical condition and the wearing of the shoes and *dealing with him in the past*, I wanted to make the arrest and take him into custody, but due to his - - I'll say, alleged condition at the time, I summoned the supervisor to the scene to make that decision, so in the medical condition, we wouldn't house him at the Roseville Jail. It might involve tying an officer up on a hospital detail which would require overtime and the chief doesn't like that, so we have to go through the supervisor and the supervisor chose not to take [defendant] into custody.
>
> *Q.* And that's - - that's procedure and - - and the policy and custom and practice in your office?
>
> *A.* Yes, ma'am. (emphasis added).

Viewed in context, the officer's use of the phrase "dealing with [defendant] in the past" was made in reference to *this* incident. The prosecutor subsequently asked the officer the following:

> You mentioned a moment ago in your testimony, his alleged injury based on *your dealings with him.* Why is it that you formed a belief that it was an alleged injury? (emphasis added).

In response, the officer explained that he believed defendant exaggerated his injury because, when he initially approached defendant, he was wearing shoes, moving his legs, smelled of intoxicants, and stated that he had been at a bar. The officer further explained that, after he advised defendant that he would be making arrests, defendant's demeanor changed and he then claimed to be in excruciating pain. Contrary to defendant's suggestion, the officer's testimony did not amount to "inadmissible propensity evidence" by implying that the officer had past encounters with defendant apart from this incident. Further, there was no indication at trial that defendant had a prior criminal record, and any inference that a prior record existed based on the prosecutor's question and the witness' response is tenuous. Consequently, defendant has failed to demonstrate plain error and, thus, this claim does not warrant reversal.

V. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective for failing to call his sister, Zielinski, as an alibi witness, and for failing to call his former attorney, Fleming, as a rebuttal witness. We disagree.

A. Standard of Review

Defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing; therefore, this Court's review is limited to mistakes apparent on the record.[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

B. Analysis

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

The failure to call a supporting witness does not inherently amount to ineffective assistance of counsel, and there is no "unconditional obligation to call or interview every possible witness suggested by a defendant." *People v Beard*, 459 Mich 918, 919; 589 NW2d 774 (1998). A trial counsel's decisions concerning what witnesses to call, and what evidence to present are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call [the] witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding." *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant has failed to demonstrate how the proffered witnesses were invaluable to his defense or how their testimony would have affected the outcome of the trial. In specific, defendant contends that, if called, Zielinski would have testified that defendant was at home at the time of the incident. But defendant has not overcome the presumption that defense counsel's decision not to call Zielinski was a matter of strategy. In fact, at trial, defense counsel noted that, although defendant wanted to call Zielinski, her testimony would have been insignificant and "quite damaging" to the case. This Court will not second-guess counsel in matters of trial strategy. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *Id*.

Defendant also contends that, if called, Fleming would have testified that, during a pretrial interview, Destremps stated that he was so intoxicated on the night of the incident that he could not remember what happened. But Destremps' level of intoxication was placed before the

[3] This Court denied defendant's motion to remand for an evidentiary hearing. (See Appendix B.)

jury. Destremps, himself, testified that, on the evening of the incident, he drank beer and whiskey for "a couple of hours," he drank a "lot of alcohol," and he had "so much to drink." Destremps acknowledged that, because of his drinking, his memory was "fuzzy" and he could not remember everything. Thus, the proposed testimony would have been cumulative and, given that the complainant and his wife positively identified defendant, would have been of little significance in this case. Consequently, defendant has failed to overcome the presumption that defense counsel, as a matter of trial strategy, reasonably refrained from presenting this cumulative testimony.

Moreover, it is unlikely that defense counsel's failure to call the potential witnesses prejudiced defendant, i.e., denied him a substantial defense. As previously indicated, there was compelling evidence presented at trial, including the detailed testimony of the complainant and his wife. Accordingly, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged failure to call the proposed witnesses, the result of the proceeding would have been different. *Effinger*, *supra*.

VI. EXCLUSION OF WITNESS TESTIMONY

Defendant's final claim is that the trial court erred by excluding the testimony of his sixteen-year-old son, thereby compromising his right to present a defense. We disagree.

In a separate record, outside the presence of the jury, defendant sought to call his sixteen-year-old son to testify that the complainant had previously attacked defendant. Defense counsel, who had interviewed the proposed witness, stated that he was opposed to calling him because of perjury concerns and because, as a matter of trial strategy, he would "damage" defendant's case. It was undisputed that the proffered witness had no personal knowledge of the charged home invasion. In response to the court's inquiry regarding the relevance of the proposed testimony, defendant stated:

> It was cuz [sic] what led up to it and why [Destremps] went and attacked that guy because of [sic] the man assaulted me.

In denying defendant's request, the court noted that the alleged attack was not a defense to the crime of home invasion, that defendant's son was not a witness to the incident, and that defendant said he was not involved.

This Court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401. But even if relevant, evidence may be excluded if its probative value is substantially outweighed by, inter alia, confusion of the issues, or waste of time. MRE 403.

A defendant's constitutional right to present a defense and call witnesses in his defense is guaranteed by the Confrontation Clause. US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). But the right to present a defense is not absolute. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). The accused must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. *Hayes, supra*.

Defendant's defense was that he did not commit the charged home invasion and, through the proposed testimony, sought to demonstrate that Destremps went to the complainant's home because the complainant had previously attacked defendant. We agree with the trial court that the proffered evidence was not relevant. As noted by the trial court, the alleged prior attack was not a defense to the charged offense. Further, the proffered testimony was contradictory to defendant's own trial testimony that "[n]othing" happened between him and the complainant before the alleged home invasion. Additionally, the proffered evidence could have easily supported an inference that, because the complainant had physically attacked defendant in the past, defendant went to his house to seek revenge. In short, defendant has failed to persuasively demonstrate how the proposed testimony was relevant and helpful to his case. MRE 401. Also, the inferences defendant was trying to draw were tenuous at best, and may have confused the issues. MRE 403.

We also reject defendant's claim that the trial court's evidentiary ruling deprived him of his constitutional right to present a defense. The trial court's ruling did not amount to a blanket exclusion of all evidence challenging the witnesses' credibility, or otherwise limit defendant's opportunity to present a defense. Moreover, contrary to defendant's implication, evidentiary rulings do not ordinarily rise to the level of a constitutional violation. See *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). Therefore, we are not persuaded that the trial court abused its discretion by excluding the challenged evidence.

Affirmed.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette